

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



July-September 2001

OPINIONS

COMPTROLLER) FIELD ENFORCEMENT DIVISION) PEACE OFFICER POWERS

Question: Does the Field Enforcement Division of the Comptroller's Office have authority to help administer the sales and use tax and income tax laws, and may an employee assigned to the Division exercise the powers of a peace officer in administering those laws?

Answer: Under State law, employees in the Division may assist generally in the enforcement of the various tax laws that the Comptroller's Office administers. However, an employee may exercise the powers of a peace officer only to the extent specifically authorized by statute. The Legislature has conferred powers of a police officer on Division personnel as to certain enumerated laws, but not as to the sales and use tax law or the income tax law.

*Opinion No. 01-019
July 11, 2001*

CORRECTIONS) PUBLIC INFORMATION ACT

Question: May the Division of Correction disclose to the general public the projected date of an inmate's release on mandatory supervision?

Answer: Yes. The Division of Correction is forbidden by statute from disclosing to the general public the contents of an inmate's case record)

including information concerning the inmate's "conduct, effort, and progress" while in custody. However, the Division may reasonably construe this prohibition not to extend to the projected date of the inmate's release on mandatory supervision.

*Opinion No. 01-023
September 17, 2001*

CRIMINAL LAW) CONFINEMENT FOR FAILURE TO PAY FINE

Question: Is it constitutional to continue the commitment of an inmate who has completed the specified period of incarceration but has failed to pay a fine, when the sentence appears to make payment of the fine a condition of release from custody?

Answer: State law authorizes a court to sentence a convicted defendant who has failed to pay a fine to an additional period of confinement to "work off" the fine. However, under both State law and the federal Constitution, the court must first assess the defendant's ability to pay the fine by inquiring into the defendant's family and financial situation. Any additional period of incarceration imposed for failure to pay the fine must be within statutory limits and may not, in any event, exceed 90 days. Finally, the total period of incarceration imposed on an indigent defendant may not exceed the statutory maximum for the underlying offense.

*Opinion No. 01-020
August 3, 2001*

**OFFICE OF PEOPLE'S COUNSEL-
EX OFFICIO MEMBERSHIP IN ISO**

The opinion concerns the participation by the Office of People's Counsel in an independent system operator ("ISO"), approved by federal regulatory authorities as a neutral facilitator of the regional wholesale electricity market serving most of Maryland.

Question: May the Office of People's Counsel become an *ex officio* member of an ISO that is structured as a limited liability company under Delaware law, and would this kind of membership subject the State to "an unacceptable risk of liability"?

Answer: The Office of People's Counsel may participate as an *ex officio* member of the ISO if the operating agreement of the ISO is amended, as currently proposed, to exempt state consumer advocates from any liability under the agreement other than a \$500 membership fee.

Opinion No. 01-021
August 23, 2001

**PHYSICIAN ASSISTANTS)
ALTERNATE SUPERVISING PHYSICIANS**

Question: Under 1999 amendments to the Maryland Physician Assistants Act, may a physician who practices in a nonhospital setting designate "alternate supervising physicians" to carry out the physician's obligation to supervise the medical acts delegated to a physician assistant in a delegation agreement?

Answer: While the 1999 amendments grant a physician greater flexibility in supervising a physician assistant, they also emphasize that the physician who enters into a delegation agreement with a physician assistant remains personally

responsible for the supervision of the physician assistant. To the extent that a physician practicing outside a hospital relies on another physician to cover his or her practice, the substitute physician may only delegate medical acts and supervise a physician assistant under a separate delegation agreement.

Opinion No. 01-018
July 2, 2001

**WORKERS' COMPENSATION)
SUSPENSION OF BUSINESS LICENSE FOR
FAILURE TO PAY UNINSURED EMPLOYERS'
FUND**

A provision of the Maryland Workers' Compensation Act requires suspension of an employer's business license when the employer fails to make required payments to the Uninsured Employers' Fund.

Q1: Does this provision apply to a dry cleaners license) a license issued by a circuit court clerk under Title 17 of the Business Regulation Article and designed primarily to raise revenue, rather than to regulate business conduct?

Answer: An employer's failure to make required payments to the Uninsured Employers' Fund may result in the suspension of the employer's business license, regardless of whether the particular license serves primarily as a revenue-raising measure or is part of a regulatory scheme.

Q2: What agency would have authority to suspend such a license and what process should be followed?

Answer: A dry cleaners license issued under Title 17 of the Business Regulation Article is subject to suspension by the Comptroller. Before suspending a license, the Comptroller should provide

the licensee with (1) notice of the proposed suspension, and (2) an opportunity to be heard that is limited to the question whether the debt has been paid.

*Opinion No. 01-022
September 10, 2001*

ADVICE LETTERS

ADMINISTRATIVE LAW) RULEMAKING) DOC GUIDELINES

Question: Is the Division of Correction required to follow APA rulemaking procedures to adopt guidelines concerning the eligibility for assignment to prerelease facilities of inmates who are serving life sentences?

Answer: Under State Government Article, §10-101(g)(2)(i), a statement that concerns only the internal management of a unit of State government, and does not affect directly the rights of or the procedures available to the public, is not a “regulation.” Because the assignment of an inmate to a security level within a correctional facility is unlikely to affect the public outside the facility, Division guidelines with respect to these assignments are not required to be adopted as regulations under the APA.

*Letter to
Delegate Salima Siler Marriott
September 6, 2001*

BUDGETARY ADMINISTRATION) WATERWAY IMPROVEMENT FUND

Question: May moneys from the Waterway Improvement Fund be used for administrative expenses of the Department of Natural Resources?

Answer: Natural Resources Article, §8-707 establishes a Waterway Improvement Fund consisting of the proceeds of an excise tax on boat sales less (1) a fixed deduction of \$225,000 per fiscal year for the State general fund, and (2) a deduction, limited to no more than \$350,000 per fiscal year, to be appropriated in the State Budget for enforcement of the Act, including collection of the tax. Moneys once deposited in the Fund may only be appropriated for purposes specified in the law. These purposes do not include the administrative and other expenses of the Licensing and Registration Service of the Department of Natural Resources. Therefore, although the Budget Act has sanctioned the practice, using money in the Fund for administrative expenses of the Department is contrary to the law governing the Fund.

*Letter to
Dawn G. Myers, Senior Policy Analyst
Department of Legislative Services
August 21, 2001*

CHARTER COUNTIES) REFERENDUM) COUNTY ORDINANCE ADOPTED UNDER NON-HOME-RULE POWERS

Question: Is a Harford County ordinance establishing the Phillips Airfield Authority subject to referendum?

Answer: No. Although the Harford County Charter provides county voters with the right to petition to referendum ordinances adopted “pursuant to this Charter,” there is no right of referral with respect to ordinances, such as the one creating the Phillips Airfield Authority, enacted pursuant to specific enabling authority from the General Assembly, unless the General Assembly clearly so provides. The Harford County Council adopted the Phillips Airfield Authority ordinance (Bill No. 01-16) pursuant to a public local law of the General Assembly, Chapter 535, Laws of Maryland 1996, which granted no right to refer the local implementing ordinance.

Letter to
Senator Donald F. Munson
July 24, 2001

**CONTROLLED DANGEROUS SUBSTANCES-
MARIJUANA FOR MEDICAL PURPOSES**

Question: What is the impact of the Supreme Court's decision in *United States v. Oakland Cannabis Buyers' Cooperative* on possible State legislation that would recognize the medical use of marijuana? May the State enact a law that would eliminate State criminal penalties for an individual who grows, possesses, or uses marijuana for medical purposes with a physician's approval?

Answer: Nothing in the *Cannabis Buyers* decision prevents the General Assembly from eliminating State criminal penalties for such activities. However, the Supreme Court indicated that there is no "medical necessity" exception to the federal prohibition on possession of marijuana. Thus, even if the General Assembly created an exception under State drug laws, individuals exempted from State prohibitions would remain subject to federal criminal prosecution or to civil actions based on federal law.

Letter to
Delegate Donald E. Murphy
July 20, 2001

**CRIMINAL LAW)
GOVERNOR'S POWER TO PARDON**

Question: Does the Governor have power to pardon an offense committed in another state?

Answer: No. However, the Governor may remove State law disabilities that flow from an out-of-State conviction and restore the convicted person's civil rights in Maryland.

Letter to
Delegate Mary-Dulany James
August 2, 2001

**ENOCH PRATT FREE LIBRARY)
GOVERNANCE**

Question: How do the Enoch Pratt Free Library's statutory charter and the State library law limit the composition and terms of the Library's Board of Trustees? Do they preclude the creation of a subsidiary Board of Directors with authority to select most of the Pratt's corporate officers?

Answer: The statutory charter, as well as State library law, require that the trustees be residents of Baltimore City. Those laws do not preclude the creation of a subsidiary Board of Directors.

Letter to
Delegate Salima Siler Marriott
July 17, 2001

**HEALTH INSURANCE)
CONSUMER EDUCATION PROJECTS**

Question: Does State law regarding the receipt and expenditure of State funds permit a consent agreement between the Insurance Commissioner and a health care insurer that requires the health insurer to fund a consumer education project?

Answer: The Insurance Article authorizes the Insurance Commissioner to levy on an insurer who has violated the Article a monetary penalty, which must be deposited in the State general fund, subject to the appropriation process. Although the Insurance Commissioner does not have authority unilaterally to require an insurer to fund an education project, the Commissioner's broad authority to enforce the Insurance Article does include authority to settle alleged violations of the Article on mutually agreed terms. These terms could require an insurer to fund a consumer education project. As long as the mutually agreed settlement does not provide funds directly to the

Insurance Commissioner, there is no requirement that the funds be deposited in the general fund.

*Letter to
Christine Scott
Department of Legislative Services
August 23, 2001*

**LEGAL NOTICES)
NEWSPAPER OF GENERAL CIRCULATION
IN PRINCE GEORGE’S COUNTY**

Chapter 709, Laws of Maryland 2001 amended the definition of “newspaper in general circulation” for purposes of publication of legal advertisements and notices in Prince George’s County.

Question: Does new Article 1, §28(b) limit the universe of such newspapers in Prince George’s County, or does it merely provide illustrations of newspapers that qualify under §28(a)?

Answer: Section §28(b) sets forth specific requirements relating to Prince George’s County that are not merely illustrative of §28(a). To qualify in Prince George’s County to publish legal advertisements and notices, a newspaper must satisfy the general requirements of Article 1, §28(a) and, in addition, either: (1) be designated by the County Council as a “newspaper of record”; or (2) be published by a small business as defined in State Finance & Procurement Article, §14-201.

*Letter to
Chief Judge Robert M. Bell
September 18, 2001*

**MUNICIPAL CORPORATIONS)
APPLICATION OF PUBLIC INFORMATION
AND OPEN MEETINGS ACTS**

Q1: Does the Public Information Act authorization to charge a reasonable fee for locating and copying a public record apply to all political subdivisions?

A: Yes.

Q2: Does the Open Meetings Act apply to meetings of a city council and appointed municipal bodies?

A: While the Open Meetings Act has been understood to apply to all city councils and most, if not all, municipal appointed boards, the law could be clarified by amending the definition of “public body”

to refer expressly to municipal boards created by municipal charter.

*Letter to
Senator Martin G. Madden
August 28, 2001*

NURSES - HEALTH MAINTENANCE ORGANIZATIONS

Question: May a nurse practitioner directly bill a health maintenance organization (“HMO”) for services provided to a member of that HMO?

Answer: Under Health General Article, §19-701.1, a nurse practitioner may directly bill an HMO if statutory conditions are satisfied. In particular, the nurse practitioner must provide the services outside of an employment or contractual relationship with the HMO; the services must be included in the benefits package of the HMO; and the provision of the services to the HMO member by the nurse practitioner must be authorized by the HMO or its agent.

*Letter to
Delegate Marilyn Goldwater
July 10, 2001*

POLICE TRAINING COMMISSION) FIREARMS SAFETY TRAINING

The Police Training Commission’s responsibilities under the Responsible Gun Safety Act of 2000 include firearms safety training, a prerequisite to obtaining a regulated firearm. An individual may satisfy the training requirement by taking a course sponsored by a “reputable organization” interested in the safe and competent handling of handguns, provided that the course is taught by an instructor certified by the “reputable organization” and provided that the course meets standards set by the Commission.

Q1: How should the Commission evaluate an organization’s course and the qualifications of the instructors that the organization certifies?

Answer: The Commission may require an organization to document its interest, experience, and expertise in the competent and safe handling of firearms, as well as the organization’s criteria for certifying instructors. In assessing information submitted by an organization, the Commission may reasonably rely on illustrative examples of reputable organizations provided by the Legislature in analogous statutes.

Q2: May the Commission delegate to its staff the assessment of a firearms safety training course?

Answer: Evaluation of a training course, including the threshold assessment of the sponsoring organization, may be delegated in the first instance to the Commission staff. If so, the Commission should have in place a process for reviewing staff decisions. Alternatively, the staff could make a recommendation about approval of a training program, which the Commission could consider in determining whether the course meets the criteria set forth in the statute and the Commission’s regulations.

*Letter to
Donald G. Hopkins, Executive Director
Police and Correctional Training Commission
July 12, 2001*

To receive copies of any item in this newsletter, please contact Kathy Izdebski, (410) 576-6327, or e-mail her at opinions@oag.state.md.us. Copies of opinions may also be obtained from the Attorney General’s website: www.oag.state.md.us.